Court, U.S.
FILED
MAR 18 1994
OFFICE OF THE CLERK

No. 93-1318

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

TRANSCON LINES, ET AL.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC. AND HEALTH AND PERSONAL CARE DISTRIBUTION CONFERENCE, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITION OF INTERSTATE COMMERCE COMMISSION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amicus National Small Shipments Traffic Conference, Inc., includes among its more than 450 members, individuals, small companies and major corporations. *Amicus* Health and Personal Care Distribution Conference, Inc. includes among its 70 members most major manufacturers of drugs, medicines and toiletries, as well as many smaller companies. Both *amici* (hereinafter "Shipper Conferences") are nonprofit membership corporations whose principal activities involve pursuing the

[1] All parties to this case have consented to the filing of this brief. Copies of the parties' consent letters have been filed with the Clerk of the Court.

interests of their members in their capacities as shippers of freight, primarily via motor carriers subject to the provisions of the Interstate Commerce Act (ICA) and regulations of the Interstate Commerce Commission (ICC) issued pursuant to that Act. Many members were customers of Transcon Lines prior to its bankruptcy.

The deluge of undercharge cases which has accompanied the bankruptcies of numerous motor carriers in recent years is well known to this Court. Shipper Conferences have been required to devote a major proportion of their resources to proceedings before the ICC and in the courts concerning undercharge claims against shippers. Shipper Conferences participated as *amici curiae* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), and in *Reiter v. Cooper*, ___ U.S. ___, 113 S.Ct. 1213 (1993). In addition, the Conferences participated as *amici* in this case on two occasions before the Ninth Circuit, the undersigned participated in the oral argument before that court, and the Conferences filed a brief as *amici* in support of the ICC's prior petition for a writ of certiorari in *ICC v. Transcon Lines*, which this Court granted. 113 S.Ct. 2955 (1993).

Shipper Conferences were also the leading shipper parties in the ICC proceedings during the period 1986-1989 that led to adoption of the credit regulations at issue here. 49 C.F.R. Part 1320. Indeed, the provisions of the present regulations were specifically adopted by the ICC in order to *prevent* the result allowed under the decision below. These regulations were adopted at the request of these Shipper Conferences and with the joint sponsorship of the trucking industry, acting through the American Trucking Association. See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 5 I.C.C. 2d 691 (1989).

Many members of the Shipper Conferences have been made defendants against undercharge claims by bankrupt truck-

ing companies based on the theory that loss of discount penalties for late payments can be imposed several years after the bills were paid and in clear violation of the ICC's credit regulations.

The Shipper Conferences support the ICC's petition for a writ of certiorari. The purpose of this brief is to supplement the arguments of the ICC with a discussion, from the shipper community's perspective, of the need for review of the Ninth Circuit's decision by the Supreme Court, and for reversal.

SUMMARY OF ARGUMENT

The ICC's Petition concerns claims for undercharges which Transcon filed against numerous shippers based on tariff provisions imposing a severe penalty for late payment of freight charges. Although ICC rules required that notice of a prospective late payment penalty be given with the freight bill, no notices were given by Transcon and its late payment claims were entirely unexpected by the shipper. Based upon a late payment provision in its tariff, Transcon seeks to collect the difference between the discounted tariff rates originally billed and paid and the full undiscounted tariff rates which are collectively set by carriers in groups in order to serve as base rates from which actual discount rates are derived. The penalty rates sought are about double the rates originally billed and paid.

The ICC's credit regulations provide important safeguards to preclude a carrier from accumulating large sums of late payment penalties by not informing shippers of their potential liability and not promptly claiming the penalty, so that the shipper could avoid recurrences of late payments. The public protections built into the regulations include: a plain notice on any original freight bills subject to prospective penalty that the discount would be forfeited if not paid by a certain date; a requirement that the carrier rebill at the higher rate within 90 days; and a provision precluding accumulation of penalty charges for a series of bills for presentation in bulk. It is

undisputed that the regulations are intended to preclude precisely what Transcon is doing here.

Transcon's collection efforts were found to violate these ICC credit regulations. But the Ninth Circuit went on to hold that the ICC could not obtain an injunction against Transcon's violations of ICC regulations because Transcon's filed tariff assertedly trumps those regulations. In so holding, the Ninth Circuit left the ICC, and thousands of shipper defendants, with no effective remedy against claims which violate the regulations on their face.

Moreover, because of its breadth, the court's holding has the effect of undermining all ICC regulations, and the public's ability to rely on those regulations is now uncertain. Because it elevates any filed tariff to a position of supremacy over the ICC's regulations, this ruling, if not reversed, will have devastating effects. Simply stated, the Ninth Circuit boldly asserts that a carrier is free to override any ICC regulation by so providing in its tariff. Misreading the scope of this Court's opinion in *Maislin*, the Ninth Circuit would tolerate a form of anarchy whereby the regulated, through tariffs they publish unilaterally, are free to trump the regulator. Ironically, Transcon's tariff item creating the rate penalty specifically provides that the *shippers* must comply with the ICC's credit regulations. Transcon would bind the shippers to rules which it claims have no efficacy as to itself.

The decision below conflicts with rulings by other federal courts, including the Third and Fifth Circuit. As matters stand, the ICC's credit regulations are in effect in the Third and the Fifth Circuit, but not in the Ninth Circuit. Since the carrier brings the action and selects the forum, by adroit forum-shopping a carrier can flout the Commission's rules as to most shippers. The relationship between carrier tariffs and ICC regulations should be uniform nationwide.

The court of appeals has also misread decisions of this Court dealing with ICC jurisdiction, the filed rate doctrine, and statutory powers invested in the ICC to control carrier credit practices. Under those decisions, the ICC is not powerless to remedy carrier violations of its regulations, merely because the carrier attempts to supervene the regulations by crafting a tariff provision which purports to nullify them.

ARGUMENT — REASONS FOR GRANTING THE WRIT

I. This Case Raises Issues of Extraordinary Importance

In its ruling on the ICC's prior petition for a writ of certiorari, this Court summarily vacated the previous decision by the Ninth Circuit and remanded this case for further consideration in light of *Reiter v. Cooper*. Both *Reiter* and *Maislin* concerned undercharges based on the bankrupt carrier's attempt to substitute tariff rates for the unfiled rates the carrier originally quoted and billed and the shipper paid. In both cases, this Court recognized the role of the ICC in assessing the reasonableness of the tariff rates on which the undercharges were based. This case involves undercharge claims giving rise to a dispute over which of two sets of filed rates — discounted tariff rates, or the higher undiscounted tariff penalty rates — should apply.

In the decision below, the Ninth Circuit rejected any role for the ICC in resolving the dispute, even though the ICC has clear statutory authority over tariffs and credit practices. The ICC had conducted a rulemaking and promulgated regulations. It was before the court of appeals under its statutory enforcement authority seeking to enjoin Transcon's violations of regulations which the statute required it to make. The court below reached its result because of its belief, based on its misreading of *Maislin* and *Reiter*, that the filed rate doctrine makes tariff provisions controlling even where the carrier violated ICC regulations.

The Ninth Circuit's holding, that by a tariff provision a carrier can "trump" the agency's regulations and accomplish a result the regulations were designed to prevent, extends beyond this case and pervasively into the law governing administrative agencies in general. The mere thought that a regulated company can defeat an agency's regulations by a tariff provision is chilling.

The adverse impacts of the decision below on Transcon's former shippers are compounded by the expansive nature of the Ninth Circuit's reasoning. It is difficult to think of a more egregious violation of ICC regulations. And yet Transcon, based on the Ninth Circuit's misreading of *Maislin*, stands to collect millions of dollars from shippers who paid the tariff rates which they were originally billed.

The Interstate Commerce Act *prohibits* the extension of credit *except under regulations of the Commission*, 49 U.S.C. § 10743. Compliance with the regulations is thus a prerequisite, mandated by Congress, for *any* extension of credit. The specific regulations that Transcon violated were adopted for the express purpose of preventing credit provisions in carrier tariffs from becoming the trap for the unwary that Transcon has now sprung. Where the carrier notes its loss-of-discount penalties on its freight bills and rebills for the higher penalty amounts within 90 days after expiration of the authorized credit period, the shipper is put on notice of the penalty and of its failure to meet the specified payment date. If the shipper thus receives notice that it has paid a bill late, it can take corrective action and prevent the accumulation of a large penalty balance. The practical impact of the Ninth Circuit's decision is that a carrier can stand by and accumulate three years of bills before it goes bankrupt, without telling the shipper along the way that any payment arrived late.

Thus, this case does not involve a minor or inadvertent deviation from some technicality buried in the Code of Federal

Regulations. As to all its shippers, Transcon consistently ignored *all* the key requirements of the regulations governing imposition of the additional penalty charges it seeks to collect. Yet the Commission's credit regulations were the sole authorization under the statute for Transcon's credit-based billing practices. If such violations as these are permissible under the filed rate doctrine, *any* ICC regulation that implements the requirements of the Interstate Commerce Act is in jeopardy. What good is an agency's regulation if it can be rendered void by the carrier?

The extraordinary importance of this case warrants granting the ICC's Petition.

II. The Decision Below Is Contrary to Decisions of This Court

The Ninth Circuit's decision hinges upon its misreading of this Court's opinion in *Maislin* and a disregard of *Reiter*. Ultimately, rather than approaching the Interstate Commerce Act as a balanced system of regulation and harmonizing its various provisions, it viewed its task as:

> ... to decide which of two competing statutory claims should have priority: the carrier's claim based on the filed rate doctrine, or the ICC's claim based on the credit provisions.
>
> In deciding which provision should be given priority, we take guidance from the Supreme Court's affirmation in *Maislin* of the vital importance of the filed rate doctrine to the ICA. (App. 5a to ICC Petition.)

And in the same vein:

> *Reiter* at most requires us to resolve a clash of two statutory claims. (App. 8a to ICC Petition.)

Certainly, the filed rate provision and the credit provision, including its directive that the ICC issue controlling credit

regulations, are both part of the same ICA, along with the requirement that carrier rates and practices be reasonable. But the Act was written by Congress to be enforced as a whole, with all its provisions given effect. All the rates to which the credit provision and the implementing ICC regulations apply are "filed rates", so Congress understood that it was not detracting from filed rates when it included credit provisions in the ICA. What the Ninth Circuit lost sight of is that both the rates initially charged by Transcon (all the thousands of discount rates in its rate tariff) as well as the undiscounted bureau rates in another tariff are likewise filed rates.

To say, as the court did, that the carrier retains veto power over the Commission's credit regulations to determine which of its filed rates will apply is to negate utterly the specific authority which Congress delegated to the ICC. If, as the court opines, a rule inserted by a carrier into its tariffs can preclude the operation of the ICC's regulations, then the carrier would be vested with the power to overrule the ICC in the discharge of a function specifically given it by statute. And, since all the rates to which the credit provision and regulations apply are filed rates, a carrier would hold a veto power over the ICC's credit rules as to all its rates, exercisable simply by a statement in its tariff that the rates apply independently of and whenever contrary to the ICC's rules. In effect, compliance with the ICC's rules would become optional on the part of the carrier and Congress' intent to regulate carriers' credit terms would be defeated.

The court erred not only by reading into the filed rate provision a carrier's power to veto the ICC's regulations but also in treating the credit regulation here as somehow substituting "secret" rates for filed rates and thereby transgressing *Maislin* (where this Court's choice was in favor of a filed rate and against an unfiled rate):

> This result [enforcing ICC credit regulations] would permit an end-run around the filed rate doctrine. A carrier and shipper could privately negotiate a discount from the filed rate. The carrier would purposely violate various credit regulations such as 49 C.F.R. 1320.3(c) which requires the original bill to the shipper to carry a notice of the penalty for late payments. If the ICC goes along, then the filed rate doctrine would be gutted. Neither the carrier nor the shipper would protest the arrangement that they themselves have negotiated. If the ICC looks the other way, only after a carrier goes bankrupt would the illegal discount be brought to light. But because the carrier intentionally failed to give notice to the shipper the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and the shipper. (App. 6a to ICC Petition.)

The court was utterly out at sea in fashioning its thesis. All the discount rates at stake in this case (there are thousands of them in Transcon's tariff and all are placed at risk by the Ninth Circuit) are filed tariff rates and not "privately" made discounts. And any other rate subject to the ICC's credit rules would have to be a filed rate visible to the public (the credit rules apply only to filed tariff rates). The Ninth Circuit suggests that the carrier might "purposely violate various credit regulations". But that is exactly what happened here: Transcon inserted a loss of discount trap in its tariff rule but did not give the actual notice of that prospective penalty on any of its freight bills, in direct contravention of the ICC's rules.

Next, the court laments that "If the ICC goes along, the filed rate would be gutted ... If the ICC looks the other way ... the ICC would have the power to enjoin the trustee's suit to enforce the filed rate, and the trustee would have no power to undo the illegal bargain struck by the carrier and shipper." This is utterly at odds with the undisputed facts of this case or any

other case where a loss of discount provision might be exercised. There was no "illegal bargain struck by the carrier and shipper", as the discount rates originally billed were published in the tariff. There is no joint effort between the shipper and carrier, either publicly or privately. Any attempt to enforce a loss of discount/late-payment penalty is entirely a unilateral operation by the carrier or its trustee-successor.

There is also certainly no occasion for the ICC to "look the other way". The ICC does not receive copies of the carrier's freight bills and would not know that the carrier was not giving the requisite notice to its shippers, until suit is later brought by the carrier. Finally, the only illegality perpetrated in this scenario is by the carrier, initially by failing to comply with the requirement to give actual notice on the freight bill and later by issuing claims for a credit penalty (the full undiscounted rate) in direct violation of the ICC's credit regulations.

In sum, *Maislin* does not support the result reached in this case. This Court's decision that the filed rate prevails over an unfiled rate (subject to ICC primary jurisdiction over the reasonableness of the filed rate) does not support the imposition of an unlawfully claimed penalty rate over a lawfully filed discount rate. And, as this Court made clear in *Reiter* — which was brushed aside in this case — there are other provisions to be given effect in the ICA in addition to the filed rate provision. Just as *Reiter* held that independent recognition must be given to the reasonableness provision, so also the credit provision — and the regulations implementing it — cannot be nullified under cover of paying homage to the filed rate provision.

The central issue in this case is also related to the issue pending before this Court, argued on February 28, 1994, in *Security Services, Inc. v. K Mart Corp.*, No. 93-284. There, the carrier attempted to base undercharge claims on filed rates which did not comply with ICC tariff regulations. In its opinion below, the Ninth Circuit relied upon the views of the circuits

which "have rejected the ICC's attempt to argue that rates filed were void because they did not follow proper filing regulations." But there is a 3-3 split among the circuits on this issue, and this Court should resolve the split in favor of the ICC's position in the *K Mart* case. That decision should provide a further basis for summary reversal of the decision below.

Nor can the Ninth Circuit's decision be reconciled with this Court's decision in *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982). This Court refused to allow a *judicially* created affirmative defense based on carrier violations of credit rules. However, the Court was careful to note the ICC's primary role in administering its credit regulations. See, *e.g.*, 456 U.S. at 351: "The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper." These remedies include "the power to seek a federal court injunction requiring a carrier to comply with the regulations." 456 U.S. at 349, quoted in the ICC Petition at 14. This is precisely the relief the Ninth Circuit denied.

To the extent that there are differences between this case and *Commercial Metals*, they compound the Ninth Circuit's error. For example, in *Commercial Metals*, the Court noted that the regulations themselves did not provide that a carrier violation precluded collection. The current regulations do prohibit collection of *penalty* charges where the carrier has violated the credit rules. See, *e.g.*, 49 C.F.R. § 1320.2(g)(iii) and (vi). The first of these subsections states that the penalty "shall be applied only to the nonpayment of original separate and independent freight bills and shall not apply to aggregate balance-due claims sought for collection on past due shipments by a bankruptcy trustee, or any other person or agent." Subsection (vi) permits collection "only" where the 90-day rebilling requirement has been met.

It is also important to note that in *Commercial Metals* the shipper was trying to use the carrier's violation of the credit rules as an excuse for paying no freight charges to the carrier. In *Transcon*, freight charges have already been paid, and the issue concerns the carrier's desire to collect a penalty on top of those charges despite its violations of ICC regulations. *Transcon* is, therefore, akin to the double-payment cases that this Court recognized in *Commercial Metals* as an exception to the rule. 456 U.S. at 351. See also *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295 (6th Cir. 1988), holding the carrier equitably estopped in a double payment case where its delays in pursuing collection deprived the shipper of notice of the accumulation of charges and led to an escalation of the loss.

Commercial Metals and *Maislin* were seen by the Ninth Circuit as foreclosing, respectively, shipper remedies and injunctive relief for the ICC. But the decision below is wrong on both counts. Aside from *supporting* the Commission's right to seek injunctive relief, as explained above, *Commercial Metals* does not foreclose all shipper remedies in a case like this one. *Maislin* was cited by the Ninth Circuit (ICC Petition, App. 3a) as rejecting the unreasonable practice defense in undercharge cases, but this characterization goes too far. *Maislin* actually acknowledged ICC jurisdiction over unreasonable practices where the issue involves determining which of two filed rates applies. 497 U.S. at 128, n.11.[2] When read in light of this aspect of *Maislin*, the conclusion is inescapable that *Commercial Metals* does not bar a challenge, on unreasonable practice grounds, to Transcon's attempt to substitute *filed* penalty rates for *filed* discount rates, in violation of regulations governing imposition of the former.

[2] Se also *Rocky Mountain Motor Tariff Bureau, Inc. v. ICC*, 590 F.2d 865 (10th Cir. 1979), upholding ICC regulations nullifying special delivery charges in carrier tariffs as an unreasonable practice.

It should also be recognized that nothing in *Commercial Metals* bars a shipper challenge to the filed penalty rate as unreasonable, and *Maislin* and *Reiter & Cooper* specifically provide for such challenges. The ICC also provided for the possibility of such challenges when it allowed carriers to impose loss of discount penalties to cover their collection costs.[3] See *Regulations for Payment of Rates and Charges — Penalty Charges for Nonpayment*, 4 I.C.C.2d 340, 343 n.2 (1988) (emphasis added):

> We view loss of discount as a liquidated damages provision because normally it will not recoup the *exact* amount of a carrier's expenditures for court costs, attorney's fees, interest on the unpaid bill, and in-house administration costs. Rather it will constitute a damage assessment that will conclusively and legally satisfy all of a carrier's claims for such costs without requiring documentation to support the precise dollar amount of the charge. *The level of the charge would, of course, be subject to review on reasonableness grounds under 49 U.S.C. § 10701.*

But where, as here, the violation of ICC credit regulations is not only clear, but undisputed, it makes no sense to relegate individual shippers to these fallback defenses. The ICC is empowered by Congress to enjoin carrier violations of the Act. The readiness of the Ninth Circuit to wipe out *all* effective remedies for Transcon's violations, despite this Court's remand of its original decision, plainly demonstrates the need for action by this Court. In *Commercial Metals*, it was noted that "The facts of this case illustrate the problems that may arise when a

[3] Here, of course, Transcon incurred no collection costs as to its original discounted rates, since those rates were paid long before Transcon brought its undercharge actions. Because it violated the ICC's credit regulations, Transcon did not even incur the minimal costs of notifying shippers of late payments.

court ventures to create law in this highly technical field." 456 U.S. at 350, n.11. Those words are equally applicable here.

III. The Decision Has Created A Conflict with Decisions Upholding the ICC's Rules in Other Circuits.

Transcon was not the first bankrupt carrier to file undercharge claims based on the alleged failure of its former shippers to pay freight charges within the tariff credit period. The leading case on the issue of violations of ICC credit regulations in an undercharge case involved The Mennen Company, a member of one of these Shipper Conferences. Asserting that the bankrupt carrier's claims were invalid due to credit rule violations, Mennen obtained referral of the issue to the ICC under the doctrine of primary jurisdiction; and the Commission found such violations to be unreasonable practices in violation of the Act. 1989 WL 239321 (I.C.C.). The District Court subsequently granted summary judgment for the shipper, affirming the ICC's decision, and the Third Circuit affirmed in an unpublished opinion. *Delta Traffic Service, Inc. v. Mennen Co.*, 730 F.Supp. 1309 (D.N.J.), *aff'd.* 919 F.2d 134 (3d Cir. 1990).

Summary judgment based on a similar ICC decision in *ADM of Mississippi, Inc.*, 1990 Fed. Carr. Cas. (CCH) ¶ 37,834 (1990 WL 287541 I.C.C.) was affirmed in an unpublished decision by the Fifth Circuit in *Delta Traffic Service, Inc. v. ADM of Mississippi, Inc.*, No. 91-1098 (5th Cir. 1992).

Though no other courts of appeals have addressed the issue, similar conclusions have been reached in federal district court cases. See, *e.g.*, *Delta Traffic Service, Inc. v. Purdue Frederick Co.*, 1989 Fed. Carr. Cas. (CCH) ¶ 83,508 (D.Conn. 1989) (referring the credit rules issue to the ICC and citing similar decisions in the District of Delaware and the District of Indiana). The ICC also addressed the credit rules issue and found violations in cases referred by district courts in the Districts of New Jersey and Ohio. See the Commission decisions published at

1990 Fed. Carr. Cas. (CCH) ¶ 37,776 and 1992 Fed. Carr. Cas. (CCH) ¶ 37,951 (1991 WL 259987 I.C.C.).[4]

The most recent decision is *Lifschultz Fast Freight, Inc. v. National Manufacturing Co.*, 804 F.Supp. 1059 (N.D.Ill. 1992), the first post-*Transcon* decision dealing with undercharge claims involving penalties claimed in violation of ICC credit regulations. The court explained (804 F.Supp. at 1064):

> To hold as the court did in *Transcon* in effect renders meaningless all the conditions to an extension of credit in 49 C.F.R. 1320-29. The regulations outlined by the ICC pursuant to its granted authority must be complied with before a carrier can invoke a loss-of-discount remedy. Otherwise, the ICC is stripped of authority as granted by Congress in the Interstate Commerce Act.

The Ninth Circuit brushed aside the contrary decisions of the Third and Fifth Circuits, saying they were unpublished and concerned tariff penalty provisions adopted when ICC credit regulations did not permit such penalties. But this distinction makes no sense. Tariffs either supersede regulations or they don't. If absolute prohibitions against loss of discount penalties in the previous ICC regulations were controlling, restrictions on such penalties in the current regulations must also be given effect.

To date, the credit rules issue presented in this case has confronted three courts of appeals (two of which — the Third and the Fifth — have disagreed with the Ninth Circuit) and district courts in at least three other circuits. The pervasiveness

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[4] A corporate affiliate of Transcon, a bankrupt carrier formerly known as PIE Nationwide, Inc., has filed 30,000 undercharge actions, a number of which involve loss of discount claims. One such case is pending before the ICC on referral by the district court. *Fidelcor Business Credit Corp. v. Dillard Department Stores*, 1992 Fed. Carr. Cas. (CCH) ¶ 83,753 (M.D.Fla. 1992).

and importance of the issue cannot be disputed. Nor can the need for uniformity on a federal question that only this Court can provide. Indeed, collection agents are even now dunning shippers illegally for late payment claims in the Third Circuit on the "authority" of the Ninth Circuit's *Transcon* opinion.

Because of clear and deepening conflicts among the courts of the various circuits as to an issue of nationwide importance, the ICC's Petition should be granted. Otherwise, the bankrupt carriers will be beating a path to the Ninth Circuit.

In contravention of established law, the Ninth Circuit decided to accord the tariff supremacy over ICC regulations. The Ninth Circuit has misread *Maislin*, *Reiter* and *Commercial Metals*. In order to correct the court of appeals' clear error of law, and to prevent irreparable injury to Transcon's former shippers, to other shippers confronting undercharge claims, and to the agency's statutory right to make enforceable regulations, this Court should summarily reverse the decision below.

CONCLUSION

For the reasons set forth above, and for the reasons set forth in the ICC's Petition, the ICC's petition for a writ of certiorari should be granted and the Court should enter an order summarily reversing the decision below as inconsistent with *Reiter* and *Commercial Metals*.

Respectfully submitted,

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